

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
OF THE STATE OF WASHINGTON

GORDON K. SOUVENIR d/b/a
SOUVENIR BOAT SHCP,

Appellant,

v.

OLYMPIC AIR POLLUTION
CONTROL AUTHORITY,

Respondent.

PCHE No. 88-38

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

This matter, the appeal of the denial of a Notice of Construction for a new air contaminant source, came on for hearing before the Pollution Control Hearings Board, Wick Dufford (presiding) and Harold S. Zimmerman, on September 23, 1988, at South Bend, Washington.

Appellant appeared by William J. Faubion, Attorney at Law. Respondent Olympic Air Pollution Control Authority (CAPCA) was represented by its attorney Fred D. Gentry. Reporter Jaime S. Morrocco of Rider and Associates reported the proceedings.

Witnesses were sworn and testified. Exhibits were examined. From the testimony heard and exhibits examined, the Board makes these

FINDINGS OF FACT

I

Respondent OAPCA is an activated air pollution control authority under the Washington Clean Air Act with responsibility for carrying out a program of air pollution prevention and control in a

1 multi-county area, including the site of the instant controversy in
2 Bay Center, Pacific County, Washington.

3 II

4 Appellant Gordon K. Souvenir is the owner of real property in Bay
5 Center, Washington, on which he has erected a sizable metal building
6 in which he hopes to engage in the fabrication and repair of boats.

7 III

8 Souvenir made application to OAPCA for approval to operate his
9 boat shop through Notice of Construction #397. On March 15, 1988, the
10 agency sent a letter to Souvenir advising him that his application
11 would not be approved. On April 11, 1988, Souvenir filed a notice
12 with the Pollution Control Hearings Board appealing OAPCA's action.
13 Thereafter, Souvenir sought reconsideration from OAPCA's Board of
14 Directors, but on May 11, 1988, the OAPCA Board affirmed the denial of
15 his application.

16 IV

17 Bay Center is a small community on Willapa Bay, remote from any
18 urban center, without extensive commercial development. The
19 neighborhood in which Souvenir has built his boat shop is a
20 residential area, heavily wooded, described as park-like by its
21 residents. The only non-residential use in the neighborhood is a fire
22 station.

23
24
25
26 FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

27 PCHE No. 88-38

(2)

V

On June 11, 1987, Souvenir applied to Pacific County for a building permit to construct a facility described as follows: "Boat shop for storing boat, nets and gear and do repairs." The application did not state that the building was to be a commercial structure.

The area in question is unzoned and, therefore, for building permit purposes nothing prevents the location of a commercial development in a residential neighborhood.

However, the proposal was controversial because Souvenir's neighbors feared that a commercial boat shop was planned. Before the building permit was approved, a County Commissioner put Souvenir in touch with OAPCA to ask if a Notice of Construction of a new air contaminant source would be required by the air pollution agency. OAPCA's control officer informed Souvenir that if the facility was merely a residential shop for storage and repair of personal fishing gear and boats, no Notice of Construction would be necessary. The control officer advised that a commercial boat shop would need to go through the Notice of Construction process before operating.

IV

Souvenir received his building permit and constructed the boat shop without filing a Notice of Construction with CAPCA. By December, 1987, boat building or repair work involving the use of fiberglassing resins was being conducted in the shop. This kind of work was pursued there sporadically through late January of 1988.

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

1 Neighbors complained of the odors from these operations to CAPCA
2 and on January 27, 1988, an OAPCA inspector journeyed to Bay Center to
3 determine whether the shop was building boats commercially.
4 Souvenir's son confirmed to the inspector that this was, in fact, the
5 case.

6
7 V

8 OAPCA's denial of the Notice of Construction was based on
9 complaints by Souvenir's neighbors of physical discomfort and
10 interference with the use and enjoyment of their property as a result
11 of the fibreglassing conducted at the boat shop.

12 Five of these neighbors testified before this Board and each
13 related at least one incident in which fumes from the boat shop caused
14 an adverse physical reaction. The complaints included dizziness,
15 headache, burning eyes, irritation of mucous membranes, tightening in
16 the throat and chest similar to a bronchial condition. Several
17 testified that the odors made staying out of doors in their yards
18 extremely unpleasant and that they were forced indoors to avoid the
19 smell.

20 VI

21 We find that odors from the boat building and repair operations
22 carried on at Souvenir's boat shop has unreasonably interfered with
23 the enjoyment of life and property by his neighbors.
24
25

VII

OAPCA also performed some rudimentary modeling of anticipated odors from the boat shop, using a 10-gallons-of-resin-per-day estimate provided by Souvenir in his application, apparently as a rough approximation of the levels used in the past.

However, Souvenir testified that his operation in the future is not likely to use more than three gallons of resin per day, a usage rate which was not modeled by the agency.

VIII

Souvenir's Notice of Construction did not propose the installation of any particular control measures or equipment to control odors. Use of activated carbon scrubbers or the employment of stacks for diffusion are known and available technologies for preventing the negative impacts of resin odors.

IX

Souvenir theorizes that the odors which disturbed his neighbors came from discarded material in an outdoor dumpster which he has since removed. We find that, more likely than not, the offending odors emanated from the shop itself and not merely from the dumpster.

X

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such.

From these Findings of Fact, the Board makes the following

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

PCHE No. 88-38

(5)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

CONCLUSIONS OF LAW

I

The Board has jurisdiction over the issues and the parties.
Chapters 43.21B RCW and 70.94 RCW.

II

The Washington Clean Air Act provides in RCW 70.94.152 that
activated air pollution authorities such as OAPCA may require notice
of the construction of any new air contaminant sources except single
family and duplex dwellings.

On receipt of such a notice, the agency is obliged to determine
whether the operation of the proposed new source

will be in accord with applicable rules and
regulations in force pursuant to this chapter, and
will provide all known available and reasonable
methods of emission control.

The statute, thus, sets forth a dual standard requiring (a)
compliance with extant regulations for the control of emissions and
(b) the use of appropriate advanced pollution control technology.
See, Weyerhaeuser v. Southwest Air Pollution Control Authority, 91
Wn.2d 77, 586 P.2d 1163 (1978).

If the quoted standard from RCW 70.94.152 is met, the agency may
issue an order of approval, providing "such conditions of operation
as are reasonably necessary to assure the maintenance of compliance"
with the Act and its regulations. Otherwise, the agency is to issue
an order preventing construction of the source.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

III

OAPCA's regulations generally parallel RCW 70.94.152 on the procedure to be followed before a new air contaminant source is established. Article 7, OAPCA Regulation I. Souvenir's boat shop is not among the new sources exempted by the agency's rules. We conclude, further, that it is not within the residential dwelling exclusion of the statute.

IV

The Clean Air Act defines "air pollution" as follows:

"Air pollution" is the presence in the outdoor atmosphere of one or more air contaminants in sufficient quantities and of such characteristics and duration as is, or is likely to be, injurious to human health, plant or animal life, or property, or which unreasonably interferes with enjoyment of life and property. RCW 70.94.030(2). (Emphasis added.)

The term "air contaminant" is defined as follows:

"Air contaminant" means dust, fumes, mist, smoke, other particulate matter, vapor, gas, odorous substance, or any combination thereof. RCW 70.94.030(1). (Emphasis added.)

OAPCA's Regulation I draws on these statutory definitions in dealing with the emission of odors. Section 9.11 reads:

(a) Effective control apparatus, measures, or process shall be installed and operated to reduce odor-bearing gases or particulate matter emitted into the atmosphere to a minimum, or, so as not to create air pollution.

(b) The Board may establish requirements that the building or equipment be closed and ventilated in such a way that all the air, gases and particulate matter are effectively treated for removal or destruction of

odorous matter or other air contaminants before emission to the outdoor atmosphere.

(c) No person shall cause or allow the emission or generation of any odor from any source which unreasonably interferes with another person's use and enjoyment of his property.

V

We conclude that operations at Souvenir's boat shop during December, 1987 and January, 1988 violated Section 9.11 of OAPCA's Regulation I. Accordingly, his Notice of Construction application seeks after-the-fact approval for an installation operated in violation of the agency's regulations before-the-fact.

Souvenir did not convince OAPCA or this Board that his future operations will avoid the violations of the past.

Moreover, he did not show that he can achieve compliance without installing any control equipment whatsoever or that to install such equipment is unreasonable.

VI

However, the agency should entertain any new application Souvenir might wish to make, varying his initial proposal. Souvenir is free to propose the installation of control equipment as contemplated by Section 9.11(a). In addition, or alternatively, he may propose to reduce the quantity of odorous resin to be used. If the latter is proposed, the agency should attempt to analyze what, if any, level of resin use can be permitted without producing excessive odors.

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

VII

Any Finding of Fact which is deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions of Law the Board enters the following
ORDER

OAPCA's denial of the Notice of Construction submitted by Gordon K. Souvenir is AFFIRMED.

DONE this 10th day of January, 1989.

POLLUTION CONTROL HEARINGS BOARD

Wick Dufford
WICK DUFFORD, Presiding

Harold S. Zimmerman
HAROLD S. ZIMMERMAN, Member